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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

ANTON JUNGHERR,
Petitioner,

VS.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
BOARD OF EDUCATION,
and MYRA KOPF,
former President of the Board,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the prosecution by a local school board and its president, the latter acting in her official capacity, of a civil action against an individual for defamation infringes, in and of itself, the individual's First Amendment right to freedom of expression.

2. Whether in a complaint for violation of 42 U.S.C. § 1983 on the part of a local school board and its president, an allegation that the president acted in her official capacity suffices, for § 1983 purposes, as an allegation of official school board policy and hence of conduct under color of law.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are listed in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I.	
THE DECISION OF THE NINTH CIRCUIT REGARDING THE SUFFICIENCY OF THE PROTECTION AFFORDED BY THE ACTUAL MALICE STANDARD OF *NEW YORK TIMES CO.* v. *SULLIVAN* TO PETITIONER'S FIRST AMENDMENT RIGHT TO FREE EXPRESSION, AS AGAINST A DEFAMATION ACTION BY A LOCAL GOVERNMENT ENTITY, IS IN CONFLICT WITH DECISIONS OF COURTS OF LAST RESORT OF FOUR STATES	6
A. The Supreme Courts Of Illinois, Tennessee, And Georgia Have Held That Criticism Of Government Is Absolutely Privileged As A Matter Of Constitutional Right And, Therefore, A Government Entity May Not Prosecute An Action For Defamation	6
B. The California Supreme Court Likewise Has Taken The Position That The Mere Prospect Of A Civil Action For Defamation Brought By A Government Entity Has A Severe Chilling Effect Upon The Exercise Of First Amendment Rights, And Has Rejected The Notion That Application Of An Actual Malice Standard Provides Sufficient Protection	8

TABLE OF CONTENTS

Page

II.

THE DECISION OF THE NINTH CIRCUIT ON THE FIRST AMENDMENT QUESTION RAISED BY PETITIONER IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT 9

A. The Court Of Appeals Has Misapplied The Holding Of This Court In *Calder* v. *Jones*, As Petitioner Here Seeks To Introduce First Amendment Considerations On A Substantive, Not On A Jurisdictional, Level 9

B. This Court Has Consistently Taken The Position That The First Amendment Prohibits The Prosecution Of Defamation Actions By Government Entities 10

III.

ALTERNATIVELY, THE NINTH CIRCUIT HAS DECIDED A QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT 11

A. As The Decision Of The Ninth Circuit Opens The Way To Defamation Actions By Government Entities, Petitioner's First Amendment Claim Presents A Serious And Important Question 11

B. Only In Decisions Preceding *Calder* v. *Jones*, And Only In Dicta, Has This Court Expressed Its View That The First Amendment Prohibits Defamation Actions By Government Entities 12

TABLE OF CONTENTS

Page

IV.

IN HOLDING THAT PETITIONER FAILED ADEQUATELY TO ALLEGE THAT RESPONDENTS ACTED UNDER COLOR OF STATE LAW, AND THUS FAILED TO STATE A CLAIM UNDER 42 U.S.C. § 1983, THE NINTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTABLE AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISION 13

A. For Purposes Of Passing Upon A Rule 12(b)(6) Motion To Dismiss, Petitioner's Allegation That Respondents Brought A Defamation Action Against Him Pursuant To The Statutes Of The State Of California And The Ordinances, Resolutions, Regulations, Customs, Usages, And Policies Of Respondent Board Of Education, Suffices As An Allegation Of Activity Under Color Of State Law 13

B. In Alleging That Respondent Board Of Education And Respondent Kopf, Acting In Her Capacity As Board President, Undertook To Sue Him For Defamation, Petitioner Has Sufficiently Alleged An Official Policy Of Respondent Board For § 1983 "Color Of Law" Purposes 14

CONCLUSION 15

APPENDIX

Opinion of Court of Appeals A-1

Order of District Court A-6

Complaint A-8

TABLE OF AUTHORITIES

Cases

Page

Aluminum Co. of America v. *City of Lafayette*, 412 N.E.2d 312 (Ind.App., 1980) 12

Brandon v. *Holt*, 469 U.S. 464, 83 L.Ed.2d 878, 105 S.Ct. 873 (1985) ..... 3, fn. 1

Calder v. *Jones*, 465 U.S. 783 79 L.Ed.2d 804, 104 S.Ct. 1482 (1984) 4, 5, 9-10, 13

Capital Dist., etc. v. Northeastern Harness, 92 N.Y. Misc.2d 232, 399 N.Y. Supp.2d 597 (1977) 12

City of Albany v. *Meyer*, 99 Cal.App. 651, 279 P. 213 (1929) 12

City of Chicago v. *Tribune Co.*, 307 Ill. 595, 139 N.E. 86, 28 A.L.R. 368 (1923) 6-7, 8, 11, 12

City of Philadelphia v. Washington Post Co., 482 F.Supp. 897 (E.D. Penn.) (1979) 12

City of Long Beach v. *Bozek*, 31 Cal.3d 527, 183 Cal.Rptr. 86, 645 P.2d 137 (1982), vacated 459 U.S. 1095 (1983), reiterated 33 Cal.3d 727, 190 Cal.Rptr. 918, 661 P.2d 1072 (1983) 8-9, 12

Cox Enterprises v. *Carroll City-County etc.*, 247 Ga. 39, 273 S.E.2d 841 ..... 8, 12

Edgartown Police Patrolmen's Ass'n v. *Johnson*, 522 F.Supp. 1149 (D.Mass., 1981) 12

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2297 (1974) 10-11

Gonzalez v. *Toledo*, 446 U.S. 635, 64 L.Ed.2d 572, 100 S.Ct. 1920 (1980) 13

Johnson City v. *Cowles Communications, Inc.*, 477 S.W.2d 750 (Tenn., 1972) 7-8, 12

Kentucky v. *Graham*, 473 U.S. 159, 87 L.Ed.2d 114, 105 S.Ct. 3099 (1985) ..... 3, fn. 1

Laxalt v. *McClatchy*, 622 F.Supp. 737 (D.Nev., 1985) .. 5, fn. 3

McAllister v. *Kuhn*, 96 U.S. 87, 24 L.Ed. 615 (1878) 14

TABLE OF AUTHORITIES

CASES

Page

Monell v. *New York City Dept. of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978) 13-14

New York Times Co. v. *Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412 (1964) 5, 6, 7, 8, 10-11, 12

Pembaur v. *Cincinnati*, 475 U.S. 469, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1985) 14

Rice v. *Sioux City Cemetery*, 349 U.S. 70, 99 L.Ed. 897 , 75 S.Ct. 614 (1955) 12

Rosenblatt v. *Baer*, 383 U.S. 75, 15 L.Ed.2d 597, 86 S.Ct. 669 (1966) 11, 12

Scheuer v. *Rhodes*, 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974) 14

Village of Grafton v. *American Broadcasting*, 70 Ohio App.2d 205, 435 N.E.2d 1131 (1980) 12

Washington Post Co. v. *Keough*, 765 F.2d 965 (1966), cert. den., 385 U.S. 1001 (1967) 4

West v. *Atkins*, 487 U.S. 42, 101 L.Ed.2d 40, 108 S.Ct. 2250 (1988) 13

Weymouth Tp. Bd. of Ed. v. *Wolf*, 178 N.J.Super. 481, 429 A.2d 431 (1981) 12

United States Constitution

First Amendment 2, 4-5, 6, 7, 8-9, 10-12, 15

Fourteenth Amendment 2, 4

Statutes

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 ..... 2, 4, 13, 14, 16

Rules

Federal Rules of Civil Procedure, Rule 12(b)(6) 3, 13, 14

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Anton Jungherr, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on January 17, 1990.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 923 F.2d 743, and is reprinted in the Appendix ("App.") to this Petition at p. A-1. The order of the

United States District Court for the Northern District of California, entered on February 13, 1989, is unreported; it is reproduced in the Appendix at p. A-6.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Court of Appeals filed its decision on January 17, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part as follows:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution provides in pertinent part as follows:

> " . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides as follows:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . failure to state a claim upon which relief can be granted,. . . ."

STATEMENT OF THE CASE

The subject of this suit under 42 U.S.C 1985 is a prior action brought against petitioner in the California Superior Court by respondent Myra Kopf ("Kopf") in her official capacity as President of the Board of Education of the San Francisco Unified School District ("Board of Education" or "Board") (Myra Kopf, as President etc., v. Anton Jungherr, Cal.Super.Ct. San Francisco City & County, 1988, No. 865176). The prior action was for defamation.

In the prior action, the state court entered summary judgment in favor of petitioner. Thereafter, petitioner brought this suit in the District Court against respondents Kopf and Board of Education.[1] Petitioner invoked the District Court's federal question jurisdiction. App. A-9. In this suit, petitioner has sought to recover monetary damages occasioned by the state court defamation action and his defense against it. He also has sought an award of punitive damages. App. A-10-11.

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[1]Having alleged that respondent Kopf acted in her official capacity as president of the Board of Education (App. A-8-9), petitioner attributed her action to the Board and joined the Board as a defendant in this suit. See *Brandon* v. *Holt*, 469 U.S. 464, 469-470, 83 L.Ed.2d 878, 105 S.Ct. 873 (1985). Which is not to say that under the allegations of the complaint, respondent Kopf cannot be held personally liable as well. See *Kentucky* v. *Graham*, 473 U.S. 159, 167, fn. 14, 87 L.Ed.2d 114, 105 S.Ct. 3099 (1985).

The District Court dismissed petitioner's complaint, with prejudice, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, upon the ground that the complaint failed to state a claim upon which relief can be granted. App. A-7. Petitioner appealed from the order of dismissal. The Court of Appeal affirmed.

In his complaint, petitioner alleged that on or about September 17, 1986, at a public meeting of respondent Board of Education, he made statements concerning respondent Kopf's handling of board business. At that time, petitioner also alleged, respondent Kopf was the Board's president as well as a candidate for reelection to the Board. App. A-9.

Petitioner went on to allege that after the meeting, but before the Board of Education election, respondents, "acting pursuant to the statutes of the State of California, and to the ordinances, resolutions, regulations, customs, usages, and policies" of the Board of Education, brought the defamation action against him. App. A-9-10.

The bringing of such an action, petitioner charged in his complaint, violated his right to free speech under the First Amendment and his Fourteenth Amendment due process and equal protection rights. App. A-10. Thus his single count complaint under 42 U.S.C. § 1983.

In its order of dismissal, the District Court noted that "[a] citizen's right to criticize his government is at the heart of the first amendment." App. A-7. It quoted the decision of the District of Columbia Circuit in *Washington Post Co.* v. *Keough*, 765 F.2d 965, 968 (1966), cert. den., 385 U.S. 1001 (1967), to the effect that "[t]he threat of a defamation action by a 'public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself.' " App. A-7.

The District Court held, however, that respondents' prosecution of a defamation action against petitioner did not of itself violate his First Amendment right to freedom of expression. Quoting from the decision of this Court in *Calder* v. *Jones*, 465 U.S. 783, 790, 79 L.Ed.2d 804, 104 S.Ct. 1482 (1984), the District Court stated that " 'the potential chill on protected First

Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits.' " App. A-7.

The decision of the Ninth Circuit affirming the order of the District Court contains alternative holdings. The Court of Appeals held that petitioner's complaint did not state a cause of action under § 1983 because petitioner "does not point to a statute, ordinance, regulation, custom or usage that subjected him to the alleged deprivations of his first and fourteenth amendment rights." App. A-3.

The Ninth Circuit also held that respondents' prosecution of a defamation action against petitioner did not violate his First and Fourteenth Amendment rights. The Ninth Circuit, like the District Court, reasoned that the requirement of proof of actual malice, as laid down in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412 (1964), provided sufficient protection for petitioner's First and Fourteenth Amendment rights.[2] The Court of Appeals, too, relied upon *Calder* v. *Jones*, *supra*. It stated that petitioner in this case,

> "like the petitioner in *Calder*, is free to exercise his first amendment right. That right, however, does not encompass a guarantee that he will never need to defend the speech in court. Once in court, however, any libel or defamation challenge to the exercise of the first amendment right must satisfy the strict *New York Times* standard."

App. A-4.[3]

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[2]In *New York Times*, this Court held that by reason of the First Amendment, a public official may not recover damages in an action for a defamatory statement regarding his or her official conduct without proof that the defendant made the statement with actual malice, defined by the Court as "knowledge that it was false or . . . reckless disregard of whether it was true or not." 376 U.S. at 280-281.

[3]The Ninth Circuit cited as well the order in *Laxalt* v. *McClatchy*, 622 F.Supp. 737 (D.Nev., 1985). App. A-5. There, a District Court gave its view that the filing of a defamation action by a public official in his or her official capacity does not work to chill the First Amendment right to

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REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE NINTH CIRCUIT REGARDING THE SUFFICIENCY OF THE PROTECTION AFFORDED BY THE ACTUAL MALICE STANDARD OF *NEW YORK TIMES CO.* v. *SULLIVAN* TO PETITIONER'S FIRST AMENDMENT RIGHT TO FREE EXPRESSION, AS AGAINST A DEFAMATION ACTION BY A LOCAL GOVERNMENT ENTITY, IS IN CONFLICT WITH DECISIONS OF COURTS OF LAST RESORT OF FOUR STATES.

A. The Supreme Courts of Illinois, Tennessee, And Georgia Have Held That Criticism Of Government Is Absolutely Privileged As A Matter Of Constitutional Right And, Therefore, A Government Entity May Not Prosecute An Action For Defamation.

In decisions spanning some 58 years, both before and after the decision of this Court in *New York Times Co.* v. *Sullivan*, *supra*, the highest courts of Illinois, Tennessee, and Georgia have held that criticism of government is absolutely privileged under the First Amendment. Therefore, these courts have held, a government entity may not prosecute an action for libel, as the mere prospect of such a suit has a severe chilling effect upon the exercise of the First Amendment right to free expression.

In *City of Chicago* v. *Tribune Co.*, 307 Ill. 595, 139 N.E. 86 28 A.L.R. 368 (1923), Chicago's government brought a libel action against a newspaper for articles which the paper had published concerning the city's precarious financial condition. The trial court sustained the paper's demurrer to the complaint, and the city appealed. The Illinois Supreme Court affirmed.

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free expression, that "the generous standards of *New York Times* v. *Sullivan*" provide an antidote. 622 F.Supp. at 750. The statement, however, was dictum, as the court itself pointed out that the defamation action before it had been brought by a United States senator in his private capacity. *Ibid.*

In its opinion, the court traced the history of criminal prosecutions for libel on government, both in England and in America. Foreshadowing this Court's opinion in *New York Times Co.* v. *Sullivan*, *supra*, 76 U.S. at 273-77, the Illinois court discussed the Sedition Act of 1798, 1 Stat. 596, and the criticisms levelled at it by Jefferson and Madison. The court then observed that the prospect of a civil action for defamation is equally effective, if not more so, to deter criticism of government. The court stated,

> "The fundamental right of freedom of speech is involved in this litigation, and not merely the right of liberty of the press. If this action can be maintained against a newspaper it can be maintained against every private citizen who ventures to criticize the ministers who are temporarily conducting the affairs of his government. Where any person by speech or writing seeks to persuade others to violate existing law or to overthrow by force or other unlawful means the existing government, he may be punished [citations omitted], but all other utterances or publications against the government must be considered absolutely privileged."

City of Chicago v. Tribune Co., *supra*, 139 N.E. at 90.

Earlier in its opinion, the Illinois court pointed out that "no court of last resort in this county has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." 139 N.E. at 88, quoted with approval in *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 291. It concluded that "every citizen has a right to criticize an inefficient or corrupt government without fear of civil as well as criminal prosecution." 139 N.E. at 90.

The Tennessee Supreme Court relied upon *City of Chicago* v. *Tribune Co.* in *Johnson City* v. *Cowles Communications, Inc.*, 477 S.W.2d 750 (Tenn., 1972). There, a municipal corporation brought a libel action against two magazine publishers, an author, and the author's employer, another publishing company. As in *City of Chicago*, the trial court sustained demurrers to the complaint, and the city appealed. The Tennessee high court, affirming the decision below, held that a civil prosecution for

defamation brought by a government entity is absolutely forbidden under the First Amendment. 477 S.W.2d at 754.

In *Cox Enterprises* v. *Carroll City-County etc.*, 247 Ga. 39, 273 S.E.2d 841, a hospital authority brought a libel action against a newspaper. The trial court denied the newspaper's motion for summary judgment, and the newspaper appealed. The Georgia Supreme Court reversed. Citing *City of Chicago* v. *Tribune Co.* and *New York Times Co.* v. *Sullivan*, both *supra*, the Georgia court, too, held that the First Amendment works as an absolute bar on defamation actions by government entities. 273 S.E.2d at 846.

B. The California Supreme Court Likewise Has Taken The Position That The Mere Prospect Of A Civil Action For Defamation Brought By A Government Entity Has A Severe Chilling Effect Upon The Exercise Of First Amendment Rights, And Has Rejected The Notion That Application Of An Actual Malice Standard Provides Sufficient Protection.

In *City of Long Beach* v. *Bozek*, 31 Cal.3d 527, 183 Cal.Rptr. 86, 645 P.2d 137 (1982), vacated 459 U.S. 1095 (1983), reiterated 33 Cal.3d 727, 190 Cal.Rptr. 918, 661 P.2d 1072 (1983),[4] the California Supreme Court held that a government entity may not maintain an action against a private citizen for malicious prosecution. Such an action, held the court, violates the citizen's right to petition the government guaranteed under both the First Amendment and the California Constitution, article I, § 3. 645 P.2d at 139.

In its opinion, the California court drew an analogy to suits for defamation brought by government entities. It rejected the notion

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[4]This Court granted certiorari, vacated the judgment of the California Supreme Court, and remanded the case to that court "to consider whether its judgment is based upon federal or state constitutional grounds, or both." 459 U.S. at 1095. On remand, the California court certified that its judgment was based upon both, and reiterated its opinion in the entirety. 661 P.2d at 1073.

that such suits might be allowed so long as recovery is conditioned upon proof of actual malice. The court stated,

> "The policy supporting an absolute privilege for criticism of the government is to allow the free communication of ideas, a concept at the core of First Amendment liberties. If the courts were to condone the imposition of civil sanctions, even if only for statements purportedly made with actual malice, a severe chilling effect would result on the legitimate exercise of the right to express beliefs freely when those beliefs appear to be derogatory of the governing authorities."

645 P.2d at 141.

The Ninth Circuit's position that a citizen's First Amendment right to criticize government "does not encompass a guarantee that he will never need to defend his speech in court" (App. A-4), clearly is at odds with the position taken by the highest courts of Illinois, Tennessee, Georgia, and California. In the view of those courts, having to defend his or her speech in court is precisely what a citizen who criticizes government must never fear.

II.

THE DECISION OF THE NINTH CIRCUIT ON THE FIRST AMENDMENT QUESTION RAISED BY PETITIONER IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. The Court Of Appeals Has Misapplied The Holding Of This Court In *Calder* v. *Jones*, As Petitioner Here Seeks To Introduce First Amendment Considerations On A Substantive, Not On A Jurisdictional, Level.

In *Calder* v. *Jones*, *supra*, 465 U.S. at 790-791, this Court held that in weighing the various factors for and against the exercise of in personam jurisdiction under a state long-arm statute in a libel action brought against an out-of-state author and editor, the state court may not place First Amendment considerations in the balance so as to tilt it against the exercise of jurisdiction. This

Court stated, "The infusion of such considerations would complicate an already imprecise inquiry. [Citation omitted.]" 465 U.S. at 790. Then citing *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. 254, and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2297 (1974), this Court went on to say,

> "Moreover, the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. [Citations omitted.] To reintroduce those concerns at the jurisdictional stage would be a form of double counting."

Calder, 465 U.S. at 790.

The Ninth Circuit has misapplied *Calder* to this case. Here, petitioner's First Amendment claim — i.e., that the prosecution by respondent Board of Education and by respondent Kopf, in her official capacity as the Board's president, of a civil action against petitioner for defamation violated his right to free expression — constitutes the very substance of his complaint. The claim is not operative on a level antecedent to consideration of the complaint's internal sufficiency. In its opinion, the Ninth Circuit recognized the difference. ("Although we are not engaged in a jurisdictional analysis, . . ." App. A-4.) But its conclusion that *Calder's* reasoning nonetheless applies here is misplaced, especially in light of this Court's clearly expressed position regarding defamation actions by government entities.

B. This Court Has Consistently Taken The Position That The First Amendment Prohibits The Prosecution Of Defamation Actions By Government Entities.

In *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 288-292, this Court also held that in an action brought by a public official for an allegedly defamatory statement which on its face is an impersonal attack, not upon the official, but rather upon the government entity for which he or she was responsible, the official may not recover without sufficient evidence that the statement was in fact made about him or her.

More precisely, this Court held that to link the official to the subject matter of the statement solely on the basis that he or she was responsible for the government entity attacked in the statement is "constitutionally insufficient." 376 U.S. at 291. Such an evidentiary course, explained the Court, "has disquieting implications for criticism of governmental conduct." *Ibid.* Quoting from *City of Chicago* v. *Tribune Co.*, *supra*, 139 N.E. at 88, the Court stated, "For good reason, 'no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.' " *Ibid.*

This principle was reiterated in *Rosenblatt* v. *Baer*, 383 U.S. 75, 79-81, 15 L.Ed.2d 597, 86 S.Ct. 669 (1966). There, this Court, relying on *New York Times*, disapproved on constitutional grounds an evidentiary presumption that an allegedly defamatory statement made about a government entity was made about the official in charge. The court emphasized that to allow such a presumption is "to invite the specter of prosecutions for libel on government, which the Constitution does not tolerate in any form." 383 U.S. at 81.

And so, far from holding that a the actual malice standard of *New York Times* provides sufficient constitutional protection as against a defamation action brought by a government entity, this Court has consistently taken the position that such an action, by reason of the First Amendment, may not be brought in the first place.

III.

ALTERNATIVELY, THE NINTH CIRCUIT HAS DECIDED A QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. As The Decision Of The Ninth Circuit Opens The Way To Defamation Actions By Government Entities, Petitioner's First Amendment Claim Presents A Serious And Important Question.

Whether the First Amendment prohibits a local school board and its president, the latter acting in his or her official capacity, from prosecuting a civil action against a private citizen for defamation is a question which this Court should consider on certiorari in this case. It is a serious and important question. It is of more than scholarly interest, and its resolution will benefit not alone the parties to this case. See *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74, 99 L.Ed. 897, 75 S.Ct. 614 (1955).

As petitioner has pointed out, the highest courts of four states are of the view that the mere prospect of a defamation action by a government entity works a severe chill upon the exercise of First Amendment rights. *City of Chicago* v. *Tribune Co.*, *supra*, 139 N.E. at 90; *Johnson City* v. *Cowles Communications, Inc.*, *supra*, 477 S.W.2d at 754; *Cox Enterprises* v. *Carroll City-County etc.*, *supra*, 273 S.E.2d at 846; *City of Long Beach* v. *Bozek*, *supra*, 31 Cal.3d at 532-534. Indeed, in all other reported decisions in which the question has been squarely presented, courts have held that the First Amendment serves as an absolute bar to defamation actions by government entities. See *Edgartown Police Patrolmen's Ass'n* v. *Johnson*, 522 F.Supp. 1149, 1152 (D.Mass., 1981); *City of Philadelphia* v. *Washington Post Co.*, 482 F.Supp. 897, 899, (E.D.Penn., 1979); *Weymouth Tp. Bd. of Ed.* v. *Wolf*, 178 N.J.Super. 481, 429 A.2d 431, 432 (1981); *Aluminum Co. of America* v. *City of Lafayette*, 412 N.E.2d 312, 314 (Ind.App., 1980); *Village of Grafton* v. *American Broadcasting*, 70 Ohio App.2d 205, 435 N.E.2d 1131, 1133-1136 (1980); *Capital Dist., etc. v. Northeastern Harness, 92 N.Y. Misc.2d 232, 399 N.Y. Supp. 2d 597, 598 (1977)*; *City of Albany* v. *Meyer*, 99 Cal.App. 651, 279 P. 213, 215 (1929). Cf. *McClatchy* v. *Laxalt*, *supra*, 622 F.Supp. at 750 (dictum).

The decision of the Court of Appeals in this case is the first to hold that the *New York Times* actual malice standard provides sufficient protection as against a defamation action by a government entity. The premise underlying the Ninth Circuit's holding is that a government entity *may* bring a defamation action against a private citizen. This decision now opens the way. Because of this decision, citizens who in the past have not hesitated to criticize government in the most robust fashions might in the future

carefully circumscribe their remarks or, what is more frightening, not speak out at all.

B. Only In Decisions Preceding *Calder* v. *Jones*, And Only In Dicta, Has This Court Expressed Its View That The First Amendment Prohibits Defamation Actions By Government Entities.

While, as noted above, this Court has expressed its view that the First Amendment does not permit a government entity to prosecute an action for defamation (*New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 291; *Rosenblatt* v. *Baer*, *supra*, 383 U.S. at 79-91), the decisions in which this Court expressed its view did not themselves concern defamation actions by government entities or by public officers in their official capacities. Also, these decisions antedate that in *Calder* v. *Jones*, *supra*, 465 U.S. 783, on which the Ninth Circuit has relied in this case.

A question which once was thought settled, has now been unsettled by the decision of the Ninth Circuit. This Court should grant certiorari in order to resolve the question definitively.

IV.

IN HOLDING THAT PETITIONER FAILED ADEQUATELY TO ALLEGE THAT RESPONDENTS ACTED UNDER COLOR OF STATE LAW, AND THUS FAILED TO STATE A CLAIM UNDER 42 U.S.C. § 1983, THE NINTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTABLE AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISION.

A. For Purposes Of Passing Upon A Rule 12(b)(6) Motion To Dismiss, Petitioner's Allegation That Respondents Brought A Defamation Action Against Him Pursuant To The Statutes Of The State Of California And The Ordinances, Resolutions, Regulations, Customs, Usages, And Policies Of Respondent Board Of Education, Suffices As An Allegation Of Activity Under Color Of State Law.

It is elementary that to state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution or laws of the United States, and that the one who committed the alleged violation acted under color of state law. *West* v. *Atkins*, 487 U.S. 42, 43, 101 L.Ed.2d 40, 198 S.Ct. 2250 (1988). Indeed, these are the only two allegations required to state a claim under § 1983. *Gonzalez* v. *Toledo*, 446 U.S. 635, 640, 64 L.Ed.2d 572, 100 S.Ct. 1920 (1980).

For purposes of a § 1983 claim, "state law" includes an ordinance or regulation of a local govenment entity, as well as a decision officially adopted or a custom followed by it. *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 568, 690, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978).

It is elementary as well that in passing upon a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim, a court must construe the complaint favorably to the pleader. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim." *Ibid.* Moreover, a complaint need state only ultimate facts. *McAllister* v. *Kuhn*, 96 U.S. 87, 89, 24 L.Ed. 615 (1878).

In his complaint, petitioner has alleged that respondents acted 'pursuant to the statutes of the State of California, and to the ordinances, resolutions, regulations, customs, usages, and policies of the aforesaid San Francisco Unified School District, ..." App. A-9. Given the above principles, for the Ninth Circuit to have held that petitioner's § 1983 claim must fail becuase petitioner has not alleged a particular ordinance or custom, is to depart so far from the acceptable and usual course of judicial proceedings as to call for the exercise of this Court's supervision.

B. In Alleging That Respondent Board of Education and Respondent Kopf, Acting In Her Capacity As Board Of President, Undertook To Sue Him For Defamation, Petitioner Has Sufficiently Alleged An Official Policy Of Respondent Board For § 1983 "Color Of Law" Purposes.

In *Pembaur* v. *Cincinnati*, 475 U.S. 469, 480-481, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1985), this Court held that for purposes of a § 1983 claim, a course of action represents official local government policy, and thus is deemed to have been performed under color of state law, where the decision to follow the course of action was made by one authorized to make it, whether or not the decision is in writing, and whether it is meant for general application in the future or only for a single occasion.

In his complaint, petitioner alleges that respondent Kopf was president of respondent Board of Education, and that in bringing the defamation action against him, she acted in her capacity as such. App. A-8-9. Petitioner also alleges that respondent Board itself joined in bringing the action. App. A-9.

Given the holding in *Pembaur*, and under the favorable reading to which the complaint in this case is entitled (*Scheuer* v. *Rhodes*, *supra*, 416 U.S. at 236), petitioner clearly has alleged an official policy of respondent Board and, hence, activity undertaken under color of state law. For this reason as well, the holding of the Ninth Circuit regarding the sufficiency of petitioner's color of law allegation is a far departure from the acceptable and usual course of judicial proceedings.

CONCLUSION

A writ of certiorari should issue, since the decision of the Ninth Circuit conflicts with decisions of courts of last resort of four states and with applicable decisions of this Court. Alternatively, should decisions of this Court be interpreted as to leave the First Amendment question raised by petitioner unsettled, this Court should grant certiorari to review and settle the question. The question is serious and important; the Ninth Circuit's decision now opens the way to civil defamation actions by govenment

entities, which, prior to the Ninth Circuit's decision, were uniformly discountenanced on Constitutional grounds.

A writ of certiorari also should issue so that this Court may review and correct the holding of the Ninth Circuit with respect to the sufficiency of petitioner's § 1983 color of law allegations, a holding by which the Ninth Circuit has so far departed from the acceptable and usual course of judicial proceedings as to call for the exercise of this Court's supervision.

Respectfully Submitted,

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Dated April 15, 1991

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANTON JUNGHERR,
Plaintiff-Appellant,
v.
SAN FRANCISCO U.S.D. BOARD OF EDUCATION, and MYRA KOPF, former president of the Board,
Defendants-Appellees.

No. 89-15364
D.C. No. CV-88-3612-WWS
OPINION

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding

Argued and Submitted
December 10, 1990 — Pasadena, California

Filed January 17, 1991

Before: Procter Hug, Jr., Robert R. Beezer and Melvin Brunetti, Circuit Judges.

Opinion by Judge Brunetti

SUMMARY

Constitutional Law

Affirming a district court dismissal of a complaint for failure to state a claim for relief, the court of appeals held that a defamation action brought by a school board president against an individual did not give rise to a section 1983 action by the individual.

A school board president filed a defamation action against appellant Anton Jungherr in California Superior Court for statements Jungherr made at a public meeting of the board about the president's handling of board business. Jungherr was granted his motion for summary judgment. Subsequently, Jungherr filed a section 1983 action against the school board and its president in district court. The district court dismissed Jungherr's complaint for failure to state a claim upon which relief could be granted.

[1] The court disagreed that the defamation action gave rise to a section 1983 action. Jungherr did not point to a statute, ordinance, regulation, custom, or usage that subjected him to the alleged deprivation of his first and fourteenth amendment rights. [2] Jungherr was free to exercise his first amendment right. The *New York Times* requirement that a plaintiff must show actual malice on the part of a libel or defamation defendant protected Jungherr's speech in this instance because it led to a summary judgment in his favor rather than forcing him to endure protracted litigation. Accordingly, the district court properly granted the board's motion to dismiss.

COUNSEL

Donald A. Casper, Jacobs, Spotswood, Ryken & Winnie, San Francisco, California, for the plaintiff-appellant.

Randy Riddle and Karen B. Konigsberg, Deputy City Attorneys, San Francisco, California, for the defendant-appellee.

BRUNETTI, Circuit Judge:

On October 7, 1986, Myra Kopf ("Kopf"), as President of the Board of Education of the San Francisco Unified School District ("Board"), filed a defamation action against Appellant Anton Jungherr ("Jungherr") in California Superior Court. That action arose out of statements Jungherr made at a public meeting of the Board about Kopf's handling of board of business. Jungherr was granted a motion for summary judgment on March 4, 1987.

On September 13, 1988, Jungherr filed an action in the United States District Court under 42 U.S.C. Section 1983, against the Board and Kopf, for acts performed pursuant to her authority as Board President. Jungherr's complaint alleged that 1) Kopf acted under authority of her office as president of the board in bringing a defamation action against Jungherr; 2) Jungherr made statements at a public meeting regarding Kopf's handling of certain board business; and 3) filing the defamation action deprived Jungherr of his first amendment right to freedom of speech and his fourteenth amendment right to equal protection. Jungherr claimed that as a result of Kopf's official acts, he incurred and should recover for attorney's fees in the sum of $28,371.25 and emotional and physical distress of an unspecified amount. Jungherr also asserted punitive damages in the sum of $1,250,000. The district court dismissed Jungherr's complaint, with prejudice, under Fed. R. Civ. P. 12(b)(6), for failure to state a claim for which relief can be granted. Jungherr appeals this dismissal.

DISCUSSION

[1] Jungherr contends that Kopf's defamation action, brought in her capacity as President of the Board, gives rise to a section 1983 action. We disagree. Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Jungherr does not point to a statute, ordinance, regulation, custom, or usage that subjected him to the alleged deprivation of his first and fourteenth amendment rights. Instead, Jungherr notes that a libel action by a government entity has never been upheld. *New York Times Co.* v. *Sullivan*, 376 U.S. 254. 291 (1964). Because it is virtually impossible for a government entity to prevail on a defamation action, Jungherr argues that merely bringing such an action infringes the defendant's first and fourteenth amendment rights. He alleges this is so, not because the

action precludes the defendant from speaking, but because the defendant is forced to endure the burden and expense of defending himself in court for speaking.

Although the precise issue of whether a defamation suit brought by a governmental entity gives rise to a section 1983 action has not been addressed, cases in our circuit and the Supreme Court give us some guidance. In *Calder* v. *Jones*, 465 U.S. 783 (1984), Jones brought a libel action against Calder in California state court, and the Supreme Court addressed whether first amendment concerns should enter into a personal jurisdiction analysis. The apparent contention by the petitioner in *Calder* was that the possible burden on first amendment interests should weigh against an assertion of personal jurisdiction. Rejecting this contention, *Calder* held:

> [T]he potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. See *New York Times Co.* v. *Sullivan*, 367 [*sic*, 376] U.S. 254 (1964); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). To reintroduce those concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws.

Calder v. *Jones*, 465 U.S. 783, 790-91 (1984).

[2] Although we are not engaged in a jurisdictional analysis. *Calder's* reasoning applies here. Jungherr, like the petitioner in *Calder*, is free to exercise his first amendment right. That right, however, does not encompass a guarantee that he will never need to defend the speech in court. Once in court, however, any libel or defamation challenge to the exercise of the first amendment right must satisfy the strict *New York Times* standard. The *New York Times* requirement that the plaintiff must show actual malice on the part of a libel or defamation defendant protected Jungherr's speech in this instance because it lead [*sic*] to a summary

judgment in his favor rather than forcing him to endure protracted litigation. *See New York Times*, 376 U.S. at 283.

Further guidance on this issue is provided by *Laxalt* v. *McClatchy*, 622 F.Supp. 737 (D.C. Nev. 1985). Relying on *Calder*, *Laxalt* held that a newspaper, sued for libel by a United States Senator, could not counterclaim for alleged violations of its first amendment rights. *Laxalt*, 622 F.Supp. at 743. *Laxalt* correctly stated

> In this case, it is clear that the filing of a libel action cannot be considered to "chill" first amendmen rights. As in *Calder*, the defendants' protection from any potential first amendment damage lies in the standards of *New York Times* and not in a first amendment *Bivens* action. To permit defendants to bring this counterclaim would be to allow exactly the form of "double counting" which the Court decried in *Calder*.

Id. at 751. Accordingly, the district court correctly granted Kopf's motion to dismiss. Given our disposition on this issue, we need not address other issues raised by Jungherr.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTON JUNGHERR,
Plaintiff,

vs.

BOARD OF EDUCATION OF THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT and MYRA KOPF,
Defendants.

No. C-88-3612-WWS
ORDER

Plaintiff Anton Jungherr filed this action pursuant to 42 U.S.C. section 1983, against the Board of Education of the San Francisco Unified School District ("Board") and former president of the Board, Myra Kopf. Defendants now move to dismiss.

According to the complaint, while Kopf was campaigning for re-election to the Board, at an open meeting of the Board, Jungherr made statements critical of Kopf and the Board.[1] Kopf, in her capacity as president of the Board, filed a state court defamation action against Jungherr based on these statements. Summary judgment was entered for Jungherr in the defamation action. Jungherr then brought this action to recover his defense costs and punitive damages. He alleges that defendants' actions under color of state law chilled the exercise of his first amendment rights.

Defendants move to dismiss on the grounds of sovereign immunity, qualified immunity, and failure to state a substantive claim upon which relief may be granted. Because the complaint fails to state a claim, the Court does not reach the immunity issues.

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[1] Neither Jungherr nor defendants say what the statements were.

To state a claim under section 1983, Jungherr must show that defendants violated one of his federal rights while acting under color of state law. Defendants contend that the filing of a defamation action by a public official in her official capacity does not infringe Jungherr's first amendment rights because those rights are "amply protected by the defamation standard established in *New York Times* v. *Sullivan*," 376 U.S. 254 (1964). (Opposition, p. 15.)

A citizen's right to criticize his government is at the heart of the first amendment. *E.g., New York Times* v. *Sullivan*, 376 U.S. at 269-70. The threat of a defamation action by a "public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." *Washington Post* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) (granting summary judgment on defamation claim), *cert. denied*, 385 U.S. 1011 (1967). However, "the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits." *Calder* v. *Jones*, 465 U.S. 783, 790 (1984) (citing *New York Times* and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)). Therefore, the filing of the defamation action did not infringe Jungherr's federal rights.

The complaint is dismissed with prejudice.

IT IS SO ORDERED.

DATED: February 13, 1989

WILLIAM W SCHWARZER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTON JUNGHERR,
Plaintiff.

v.

BOARD OF EDUCATION OF THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT, and MYRA KOPF
Defendants.

D.C. No. C-88-3612-WWS
Complaint for Damages (Civil Rights)

Filed Sept. 13, 1988.

Plaintiff alleges:

I

Defendant Board of Education of the San Francisco Unified School District (hereinafter "Board of Education") is, and at all times hereinafter mentioned was, the duly constituted and acting governing board of the San Francisco Unified School District of the City and County of San Francisco, State of California, a school district duly organized and existing under and by virtue of the laws of the State of California. Under the provisions of Section 35162 of the California Education Code, defendant Board of Education may sue and be sued.

II

Defendant Myra Kopf is, and at all times hereinafter mentioned was, a resident of the aforesaid City and County of San Francisco. At all times hereinafter mentioned, defendant Myra Kopf was the duly elected, qualified, and acting President of her co-defendant Board of Education. Each and every act of defendant Myra Kopf described hereinafter was undertaken or per-

formed, or was caused to have been undertaken or performed, by her by virtue and under the authority of her office as President of her co-defendant Board of Education.

III

This action arises under the Constitution of the United States, more particularly, under the provisions of the First and Fourteenth Amendments thereto, and under the laws of the United States, more particularly, under the provisions of Title 42 of the United States Code, Section 1983.

IV

This court has jurisdiction of this action under the provisions of Title 28 of the United States Code, Section 1331.

V

On or about September 17, 1986, during that period of time in which defendant Myra Kopf was declared candidate for reelection to her co-defendant Board of Education in the general election held in the aforesaid City and County of San Francisco on November 4, 1986, plaintiff, at a public meeting of defendant Board of Education, made statements and comments regarding the transaction by defendant Myra Kopf of certain business of her co-defendant Board of Education.

VI

Thereafter, on October 7, 1986, defendants, and each of them, acting pursuant to the statutes of the State of California, and to the ordinances, resolutions, regulations, customs, usages, and policies of the aforesaid San Francisco Unified School District, commenced an action against plaintiff in the Superior Court of the State of California in and for the City and County of San Francisco, which action was styled *Myra Kopf, as President of the San Francisco Unified School District's Board of Education*, vs. *Anton Jungherr*, No. 865176, and which action was for defama-

tion by reason and on the basis of plaintiff's statements and comments described hereinabove.

VII

On March 4, 1987, after hearing on a motion for summary judgment made in the said action for defamation by plaintiff, therein the defendant, the aforesaid superior court entered judgment in his favor.

VIII

Such conduct of defendants, and each of them, deprived plaintiff of rights, privileges, and immunities secured to him by the Constitution of the United States, namely, the right to freedom of speech secured to him by the First Amendment, and the right not to be deprived of life, liberty, or property without due process of law, and the right to the equal protection of the laws, secured to him by the Fourteenth Amendment to the Constitution.

IX

As a direct consequence and result of the conduct of defendants, and each of them, as described hereinabove, plaintiff was required to and did employ the services of attorneys in the defense of the said action for defamation, and incurred expenses for such services, all to his damage in the sum of $28,371.25.

X

As a further direct consequence and result of the conduct of defendant, and each of them, as described hereinabove, plaintiff suffered severe emotional and physical distress, and was injured in mind and body, all to his damage in a sum according to proof.

XI

The conduct of defendant Myra Kopf, as aforesaid, was undertaken wilfully and with callous and reckless indifference to and

disregard of plaintiff's rights under the First and Fourteenth Amendments to the Constitution of the United States, as described hereinabove, and with the purpose and intent of punishing and amercing plaintiff for his having made the statements and comments described hereinabove in the exercise of the right to freedom of speech secured to him by the First Amendment to the Constitution, and with the purpose and intent of causing plaintiff to refrain from making further statements and comments in the exercise of such right and regarding the transaction by defendant Myra Kopf of certain business of here co-defendant Board of Education during that period of time in which she was a declared candidate for re-election thereto in the general election held in the aforesaid City and County of San Francisco on November 4, 1986. Plaintiff is therefore entitled to an award of exemplary and punitive damages in the sum of $1,250,000.

WHEREFORE, plaintiff demands judgment:

1. Awarding plaintiff actual damages in a sum according to proof;

2. Awarding plaintiff punitive damages in the sum of $1,250,000;

3. Awarding plaintiff reasonable costs and expenses of this action; and

4. Granting plaintiff such other and further relief as may be just.

JACOBS, SPOTSWOOD,
RYKEN & WINNIE

By /s/ Donald A. Casper
DONALD A. CASPER

Attorneys for Plaintiff